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4 NATHANIEL FOSTER, et al.,
5 Plaintiffs,
6 v.
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8 UNITED AIRLINES, INC., et al.,
9 Defendants.

10 Case No. [3:19-cv-02530-JD](#)

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28 **ORDER RE CHOICE OF LAW AND
EXPERT WITNESS TESTIMONY**

On February 8, 2019, plaintiff Nathaniel Foster Jr. was injured during an assisted deboarding of United Airlines Flight 4193 at Monroe Regional Airport in Monroe, Louisiana. *See Dkt. No. 74.* Foster was quadriplegic and required a tracheal tube and ventilator to breathe, and a power wheelchair for mobility. *See id.* at 3. In the course of deplaning, Foster's tracheal tube was dislodged, preventing him from breathing for a significant period of time. *See id.* ¶ 66; Dkt. No. 213 at 3-4. Foster was left in a coma from which he has not awakened. *See Dkt. No. 213* at 4.

Foster's mother Pamela, father Nathaniel Sr., and sister Natalie, are also plaintiffs and were with him during the incident.¹ Dkt. No. 74 ¶ 13. Pamela purchased the airline tickets from defendant United Airlines, Inc. (United) after calling discuss accessibility arrangements for her son. *See id.* ¶¶ 4, 6. The itinerary started with a United flight from San Francisco International Airport in California, the Fosters' home state, to Houston, Texas. *See id.* ¶ 7. From there, the family boarded a plane operated by defendant ExpressJet Airlines LLC d/b/a United Express (ExpressJet), with Monroe as the destination. *See id.* ¶ 20; Dkt. No. 143-16. Defendant DAL Global Services, LLC (DGS) provided ground and ramp services for United at around 170 to 180 "stations" across the country, including Monroe Regional Airport. Dkt. No. 143-1 at ECF p. 7.

¹ All four plaintiffs share the same last name. To avoid confusion, Nathaniel Foster Jr.'s mother, father, and sister will be referred to by their first names.

1 The Fosters have sued United, ExpressJet, DGS, and United Airlines Holdings, Inc. for:
2 (1) negligence and negligence per se; (2) negligent hiring, supervision, and retention; (3) breach of
3 contract; (4) negligent misrepresentation; and (5) intentional infliction of emotional distress. Dkt.
4 No. 1 (original complaint); Dkt. No. 74 (second amended complaint). United Airlines Holdings
5 was dismissed because the operative complaint did not adequately allege an alter ego claim. Dkt.
6 No. 116.

7 In February and March 2022, the parties filed a raft of summary judgment and *Daubert*
8 motions. Dkt. Nos. 138, 139, 140, 141, 142, 143, 144, 145, 146, 147, 148, 149, 150. The motions
9 were terminated without prejudice, and the parties were directed to file a joint statement outlining
10 their trial plan, which could include “a short proffer (1) by any party proposing to re-file a
11 summary judgment motion that explains in no more than 2 pages the issue of undisputed fact
12 suitable for summary judgment, and (2) by any party proposing to re-file a *Daubert* motion that
13 explains in no more than 1 page the reasons for exclusion.” Dkt. No. 193 at 1. The statement also
14 directed the parties to “state each side’s understanding of what state law applies to the case, and
15 why.” *Id.* The parties filed a joint statement with summary judgment and *Daubert* proffers, Dkt.
16 No. 195, and a status conference was held to discuss these issues, Dkt. No. 205.

17 After the parties agreed to streamline the case, Dkt. Nos. 210 and 218, the remaining
18 claims are negligence and negligence per se against all defendants, breach of contract against
19 United and ExpressJet, and negligent misrepresentation against United. Four motions, each fully
20 briefed, are now before the Court for disposition. The first is whether California or Louisiana law
21 applies to plaintiffs’ claims, to the extent that those states’ laws materially differ. Dkt. Nos. 212,
22 213. The second is plaintiffs’ motion to exclude the testimony of aviation expert Daniel Mazzeo.
23 Dkt. No. 222. The third and fourth are two motions for partial summary judgment brought by
24 United. Dkt. Nos. 216, 217.

25 The partial summary judgment motions will be addressed in a separate order. This order
26 resolves the choice-of-law question, and the admissibility of Mazzeo’s testimony. The parties’
27 familiarity with the record is assumed.

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DISCUSSION

I. CHOICE OF LAW

“It is well-established that in diversity cases, such as this one, ‘federal courts must apply the choice-of-law rules of the forum state.’” *Rustico v. Intuitive Surgical, Inc.*, 993 F.3d 1085, 1091 (9th Cir. 2021) (quoting *Ledesma v. Jack Stewart Produce, Inc.*, 816 F.2d 482, 484 (9th Cir. 1987)); *see also In re Facebook Biometric Privacy Litig.*, 185 F. Supp. 3d 1155, 1167 (N.D. Cal. 2016). “As the forum state, California will apply its own law ‘unless a party litigant timely invokes the law of a foreign state.’” *Chen v. L.A. Truck Ctrs., LLC*, 7 Cal. 5th 862, 868 (2019) (quoting *Hurtado v. Superior Ct.*, 11 Cal. 3d 574, 581 (1974)). “[T]he foreign law proponent must identify the applicable rule of law in each potentially concerned state and must show it materially differs from the law of California.” *Wash. Mut. Bank, FA v. Superior Ct.*, 24 Cal. 4th 906, 919 (2001). Choice-of-law questions are examined on an issue-by-issue basis.² *See id.* at 920 (stating that “a separate conflict of laws inquiry must be made with respect to each issue in the case”).

In this case, the choice-of-law question is whether Louisiana law should determine the availability of punitive damages and the apportionment of liability for compensatory damages, as defendants contend. *See Dkt. No. 213.*

California courts “have ‘adopted and consistently applied the so-called “governmental interest” analysis as the appropriate general methodology for resolving choice-of-law questions.’” *Rustico*, 993 F.3d at 1091 (quoting *McCann v. Foster Wheeler LLC*, 48 Cal. 4th 68, 83 (2010)). This analysis entails three steps:

First, the court determines whether the relevant law of each of the potentially affected jurisdictions with regard to the particular issue in question is the same or different. Second, if there is a difference, the court examines each jurisdiction’s interest in the application of its own law under the circumstances of the particular case to determine whether a true conflict exists. Third, if the court finds that there is a true conflict, it carefully evaluates and compares the nature and strength of the interest of each jurisdiction

² The concept of deciding choice of law on an issue-by-issue basis is formally known as *dépeçage*. *See dépeçage*, Black’s Law Dictionary (11th ed. 2019) (“A court’s application of different state laws to different issues in a legal dispute; choice of law on an issue-by-issue basis.”).

in the application of its own law to determine which state's interest would be more impaired if its policy were subordinated to the policy of the other state.

Kearney v. Salomon Smith Barney, Inc., 39 Cal. 4th 95, 107-08 (2006) (internal quotations and citation omitted); *see also Rustico*, 993 F.3d at 1091; *In re Capacitors Antitrust Litig.*, No. 17-md-02801-JD, 2020 WL 6462393, at *6 (N.D. Cal. Nov. 3, 2020). Under this approach, the place of the wrong is not necessarily determinative of the law to be applied. As the California Supreme Court stated in adopting the governmental interest analysis, “when application of the law of the place of the wrong would defeat the interests of the litigants and of the states concerned, we have not applied that law.” *Reich v. Purcell*, 67 Cal. 2d 551, 554 (1967).

A. Punitive Damages

Step one of the choice-of-law analysis is readily satisfied with respect to punitive damages: California allows them in a broader range of circumstances than Louisiana does. “Punitive damages are permissible under California law when there is ‘clear and convincing evidence that the defendant has been guilty of oppression, fraud, or malice.’” *Hardeman v. Monsanto Co.*, 997 F.3d 941, 971 (9th Cir. 2019) (quoting Cal. Civ. Code § 3294(a)). In contrast, the “general public policy in Louisiana is against punitive damages.” *Stephenson v. Bryce W. Hotard Sunbelt Rentals, Inc.*, 271 So. 3d 190, 192 (La. 2019) (per curiam); *see also Ross v. Conoco, Inc.*, 828 So. 2d 546, 555 (La. 2002) (same). Louisiana law makes punitive damages “available only where authorized by statute.” *Warren v. Shelter Mut. Ins. Co.*, 233 So. 3d 568, 586 (La. 2017); *see also* La. Civ. Code art. 3546. Neither party contends that this case implicates one of Louisiana’s narrow statutory authorizations for punitive damages.

For step two of the choice-of-law analysis, the Court “must determine what interest, if any, California and [Louisiana] have in seeing their respective laws applied to this case.” *Rustico*, 993 F.3d at 1091. “Only if each jurisdiction involved as a legitimate but conflicting interest in applying its own law will there be a ‘true conflict,’ requiring us to move on to step three of the analysis.” *Id.* (quoting *Cooper v. Tokyo Elec. Power Co. Holdings, Inc.*, 960 F.3d 549, 560 (9th Cir. 2020)).

1 Both sides agree that California has a legitimate interest in seeing its laws governing
2 punitive and compensatory damages applied to this case. Plaintiffs are residents of California and
3 arranged in California for assistance with boarding and deplaning their United flights. *See* Dkt.
4 No. 212 at 1-2. California has an obvious interest in business dealings between California
5 residents and commercial enterprises. In addition, Foster, who remains “in a persistent vegetative
6 state,” *id.* at 2, is being cared for in California, and is subject to a possible lien on a monetary
7 award in this case by the California Department of Health Care Services (DHCS), although there
8 is some indication that DHCS will not pursue a lien, *see* Dkt. No. 219-1 at ECF p. 1. Overall, as
9 defendants forthrightly acknowledge, “California has an interest in assisting California residents.”
10 Dkt. No. 213 at 11.

11 The crux of the dispute at step two is whether Louisiana has a “legitimate but conflicting
12 interest” in seeing its punitive damages law applied. Plaintiffs say that Louisiana has no interest in
13 enforcing its punitive damages law because this case is not in a Louisiana court and defendants are
14 not “Louisiana corporations or headquartered” there. Dkt. No. 212 at 4-5. They cite authority for
15 the proposition that Louisiana’s interest in limiting punitive damages “lies in the protection of its
16 judicial system, rather than domestic defendants, from what it might consider inherently
17 speculative awards.” *Pittman v. Kaiser Aluminum & Chem. Corp.*, 559 So. 2d 879, 883 (La. Ct.
18 App. 1990) (citing *Ardoyno v. Kyzar*, 426 F. Supp. 78, 83 (E.D. La. 1976)). Defendants say that
19 Louisiana law “limits liability of entities engaging in business in Louisiana and protects from
20 excess financial burdens and exposure of non-compensatory, punitive damages.” Dkt. No. 213 at
21 11.

22 It is not dispositive for choice-of-law purposes that Louisiana law might have foreclosed
23 punitive damages had this case been brought there. The state interest expressed in *Pittman*,
24 namely protecting Louisiana’s judicial system from speculative punitive awards, does not create a
25 genuine conflict with California law. In addition, Louisiana’s disallowance of punitive damages
26 may be understood as “the expression of a particular view of the appropriate role of the courts in
27 adjudicating civil disputes: to compensate, rather than to punish.” *Scott v. Ford Motor Co.*, 224
28 Cal. App. 4th 1492, 1506 (2014). As Louisiana case law has long noted, “there is nothing in the

provisions of our Code or settled principles of law which sanctions what are called punitory, vindictive, or exemplary damages -- in other words damages which blend together the interests of society and of the aggrieved individual. . . . Criminal punishment is not to be inflicted in a civil action.” *Vincent v. Morgan’s La. & T.R. & S.S. Co.*, 140 La. 1027, 1047 (1917) (quoting *Black v. Carrollton R.R. Co.*, 10 La. Ann. 33, 44 (1855) (Slidell, C.J., dissenting)). But while Louisiana may have “a strong interest in seeing its view of the appropriate policy carried out in its own courts, it has a correspondingly minimal interest in seeing the same policy implemented in the courts of California.” *Scott*, 224 Cal. App. 4th at 1506.

This leaves defendants’ suggestion that Louisiana limits punitive damages to protect businesses that operate in the state. There is support for the proposition that “Louisiana’s policy in disallowing punitive damages” is motivated by a desire “to protect its domiciliaries from excessive legal liability.” *Arabie v. CITGO Petroleum Corp.*, 89 So. 3d 307, 329 (La. 2012) (Knoll, J., concurring in part and dissenting in part); *see also Ardoyno*, 426 F. Supp. at 83 (anticipating that Louisiana’s interest in avoiding speculative punitive damages would either be “restricted to avoiding speculative damages against Louisiana domiciliaries” or protecting the integrity of Louisiana courts, and assuming the latter). This policy affords broader protection than it would appear at first glance, as Louisiana law contemplates that a “juridical person” -- such as a corporation, *see* La. Civ. Code art. 24 -- can be considered a domiciliary even if Louisiana was not its state of formation or principal place of business. Under limited circumstances, a corporation that “is domiciled outside [Louisiana], but which transacts business in [Louisiana] and incurs a delictual or quasi-delictual obligation arising from activity within [Louisiana],” will be treated as a Louisiana domiciliary. La. Civ. Code art. 3548; *see also ASI Fed. Credit Union v. Leotran Armored Sec., LLC*, 259 So. 3d 1141, 1149 n.13 (La. Ct. App. 2018) (“A ‘delictual’ obligation is an obligation constituting a tort.”).

Even so, defendants do not contend that they should be treated as Louisiana domiciliaries for present purposes. They say only that they deserve the protection of Louisiana’s punitive damages law because they conduct some measure of business in the state. *See* Dkt. No. 213 at 11. Louisiana has not framed its interest in disallowing punitive damages so broadly. If conducting

1 business in Louisiana was the relevant inquiry, its legislature or courts could have said so.
2 Instead, they have indicated that the state's interest -- in addition to protecting the Louisiana
3 judicial system from having to entertain speculative punitive awards and punishments in civil
4 cases -- is in shielding Louisiana domiciliaries from excessive financial burdens, and they have
5 defined the class of entities that qualify as domiciliaries. *See Arabie*, 89 So. 3d at 314-16. Having
6 failed to claim domiciliary status or discuss the relevant factors under Louisiana Civil Code
7 Article 3548,³ defendants have not shown that they are domiciliaries to which Louisiana's
8 protective interest extends.

9 Defendants' heavy reliance on *McCann* does not point to a different conclusion. *See* Dkt.
10 No. 213 at 5-6. Plaintiff McCann was employed by a construction company to install a boiler at
11 an oil refinery in Oklahoma that was designed and manufactured by defendant Foster Wheeler, a
12 company headquartered in New York. *See McCann*, 48 Cal. 4th at 76-77. McCann, an Oklahoma
13 resident, was exposed to asbestos during the boiler's installation in 1957, moved to California in
14 1975, was diagnosed with mesothelioma in 2005, and then sued Foster Wheeler in California. *See*
15 *id.* at 76-78. McCann's claim would have been timely under California law but barred by
16 Oklahoma's applicable ten-year statute of repose. *See id.* at 82. The California Court of Appeal
17 concluded that California law applied, reasoning that "Oklahoma's interest in the application of its
18 statute of repose is substantially limited to application of the statute to companies headquartered in
19 Oklahoma and does not equally encompass out-of-state companies who design or construct
20 improvements to real property located in Oklahoma." *Id.* at 76. The California Supreme Court
21 reversed, stating that Oklahoma had a legitimate interest in seeing its business friendly, liability
22 limiting rules apply to in-state and out-of-state companies alike, so long as they conducted
23 business in Oklahoma. *See id.* at 91-92.

24 *McCann* is not determinative here. Its holding is limited to cases where there is an
25 "absence of any explicit indication that a jurisdiction's 'business friendly' statute or rule of law is
26 intended to apply only to businesses . . . that have some . . . designated relationship with the state."

27
28 ³ The analysis under Article 3548 overlaps with California's governmental interest analysis, but is
not coextensive with it. *See* La. Civ. Code arts. 3548, 3542, 3515.

1 *Id.* at 92. That is not the situation here, where Louisiana’s limitations on punitive damages do not
2 include shielding non-domiciliaries or limiting their liability for business conducted in the state.
3 Defendants, the proponents of applying Louisiana law, have provided no authority to suggest
4 otherwise. *See Scott*, 224 Cal. App. 4th at 1506-07 (rejecting a defendant’s formulation of
5 Michigan’s interest in applying its punitive damages ban, in part, because it was not “an interest
6 that has ever been articulated by Michigan courts”).

7 Consequently, Louisiana does not have a legitimate interest in seeing its punitive damages
8 law applied in this case, and the choice-of-law analysis for this issue ends at step two, in favor of
9 applying California law. Even if Louisiana had some identifiable interest in seeing its law applied,
10 the same outcome would be reached at step three. Contrary to defendants’ suggestion, *see Dkt.*
11 No. 213 at 6, this is not a straightforward case where, “by entering Louisiana, plaintiff exposed
12 himself to the risks of the territory, and should not expect to subject defendants to a financial
13 hazard that Louisiana law had not created.” *Offshore Rental Co. v. Cont'l Oil Co.*, 22 Cal. 3d 157,
14 169 (1978) (cleaned up). United marketed and sold airline tickets to the Fosters, California
15 residents, to provide transportation services from San Francisco to Monroe. ExpressJet and DGS,
16 through their contracts with United, helped United to fulfill its business obligation. Louisiana’s
17 interest in shielding defendants from punitive damages when United, with the aid of ExpressJet
18 and DGS, effectively “chose to do business in [a state] permitting the imposition of such
19 damages,” is weak at best. *Scott*, 224 Cal. App. 4th at 1508. California, on the other hand, has a
20 strong interest in deterring egregious wrongdoing -- to the extent the complaint alleges such
21 wrongdoing -- by any corporation that offers and facilitates interstate travel services, originating in
22 California, to California residents. California’s interest would be more impaired if its policy was
23 subordinated to Louisiana’s policy in this case.

24 **B. Apportionment of Liability**

25 For step one of the choice-of-law analysis for this question, California and Louisiana differ
26 with respect to apportioning liability for compensatory damages. California law “provides that
27 liability for economic damages is joint and several, but liability for noneconomic damages is
28 apportioned according to the principles of comparative fault.” *C.B. v. City of Sonora*, 769 F.3d

1 1005, 1031 (9th Cir. 2014) (en banc); *see Cal. Civ. Code § 1431.2(a)*. For noneconomic damages,
2 California law provides that “a defendant’s percentage of fault is his or her proportionate share of
3 fault as compared with all fault responsible for the plaintiff’s injuries,” meaning that “damages
4 must be apportioned among the universe of tortfeasors including nonjoined defendants.” *Diaz v.*
5 *Carcamo*, 51 Cal. 4th 1148, 1156 (2011) (cleaned up). Louisiana employs a “pure comparative
6 fault regime,” *Martin v. Thomas*, 346 So. 3d 238, 245 (La. 2022), the principles of which “apply
7 in ‘any action for damages’ and apply to ‘any claim’ asserted under ‘any law or legal doctrine or
8 theory of liability,’” *Thompson v. Winn-Dixie Montgomery, Inc.*, 181 So. 3d 656, 664 (La. 2015).
9 Louisiana law provides that “the negligence ‘of all persons,’ including those not in the litigation,
10 those without the ability to pay, and the injured victim him- or herself, ‘shall’ be assigned a
11 percentage of fault.” *Martin*, 346 So. 3d at 245 (quoting La. Civ. Code art. 2323; La. Code Civ.
12 Proc. art. 1812).

13 At step two, the question again is whether Louisiana has an interest in the application of its
14 comparative fault laws in this case. “The fundamental purpose of Louisiana’s comparative fault
15 scheme is to ensure that each tortfeasor is responsible only for that portion of the damage he has
16 caused.” *Miller v. LAMMICO*, 973 So. 2d 693, 706 (La. 2008). In contrast to punitive damages,
17 there is no indication that this interest is limited to protecting only Louisiana domiciliaries or the
18 integrity of proceedings in Louisiana courts. In addition, as defendants suggest, the universe of
19 potential tortfeasors includes nonjoined “entities, municipal governments, and medical providers
20 in Louisiana.” Dkt. No. 213 at 11; *see also id.* at 10 (“The jury may apportion negligence to the
21 four Monroe Fire Department EMTs and firefighters that ineffectively performed CPR for almost
22 20 minutes without checking the airway to find the dislodged tracheotomy tube.”). Under these
23 circumstances, Louisiana has a legitimate interest in applying its liability-apportioning rules to
24 conduct within its borders, and a true conflict exists.

25 The analysis at step three also points to the application of Louisiana’s comparative fault
26 regime in this case. As an initial matter, California’s interest in the application of its liability rules
27 is muted, given its own skepticism of joint and several liability. *See Offshore Rental*, 22 Cal. 3d at
28 166 (“The [comparative impairment] approach incorporates several factors for consideration: the

1 history and current status of the states' laws; the function and purpose of those laws.”). The
2 California Fair Responsibility Act of 1986, known as Proposition 51, was the ballot initiative
3 passed by voters that created the state's bifurcated approach to the apportionment of liability
4 depending on whether the damages are economic or noneconomic. *See Evangelatos v. Superior*
5 Ct., 44 Cal. 3d 1188, 1192 (1988). The “findings and declaration of purpose” that accompanied
6 Proposition 51 state that “[t]he legal doctrine of joint and several liability, also known as ‘the deep
7 pocket rule’, has resulted in a system of inequity and injustice that has threatened financial
8 bankruptcy of . . . private individuals and businesses and has resulted in higher prices for goods
9 and services to the public.” Cal. Civ. Code § 1431.1. While California did retain joint liability for
10 economic damages, this was the result of a compromise that “recogniz[ed] the potential inequity in
11 a rule which would require an injured plaintiff who may have sustained considerable medical
12 expenses and other damages as a result of an accident to bear the full brunt of the loss if one of a
13 number of tortfeasors should prove insolvent.” *Evangelatos*, 44 Cal. 3d at 1198. But plaintiffs
14 have not said, and the record does not suggest, that there is a serious possibility that they will
15 prevail at trial yet be left empty-handed due to the insolvency of any defendant.

16 California cases recognize that Louisiana has a significant interest in having its liability-
17 limiting rules apply, as it is the state where the injuries and much of the allegedly tortious conduct
18 occurred. “California choice-of-law decisions generally hold that when the law of the other state
19 limits or denies liability for the conduct engaged in by the defendant in its territory, that state’s
20 interest is predominant, and California’s legitimate interest in providing a remedy for, or in
21 facilitating recovery by, a current California resident properly must be subordinated because of
22 this state’s diminished authority over activity that occurs in another state.” *McCann*, 48 Cal. 4th at
23 100-01. In this context, *McCann* applies with full force. Unlike in the punitive damages context,
24 there is no explicit indication that Louisiana’s interests in applying its comparative fault rules are
25 limited to protecting individuals and businesses that qualify as its domiciliaries.

26 With respect to conduct occurring within its borders, Louisiana has a strong interest in
27 apportioning liability for compensatory damages. California has a diminished interest in the
28 application of its joint and several liability rules. While California also has a cognizable interest in

1 seeing that its residents recover the full amount of damages for any injuries they may suffer, that
2 interest is not predominant under recent California case law and the circumstances here. *See, e.g.*,
3 *Castro v. Budget Rent-A-Car Sys., Inc.*, 154 Cal. App. 4th 1162, 1182 (2007) (“Although
4 [plaintiff’s] individual financial circumstance and the possible cost to California taxpayers and
5 businesses are legitimate concerns for California, they are not sufficient to reallocate Alabama’s
6 and California’s respective spheres of law making influence.”) (internal quotations and citation
7 omitted). Louisiana’s interests in seeing its comparative fault rules apply to this case would be
8 more impaired if California law applied than California’s interests if Louisiana law applied.
9 Consequently, Louisiana law will apply to this issue.⁴

10 **II. EXPERT WITNESS TESTIMONY**

11 Plaintiffs ask to exclude the testimony of Daniel Mazzeo, an aviation expert. Dkt. No.
12 222. Plaintiffs say that Mazzeo’s opinions about whether the equipment used to deplane Foster
13 complied with federal regulations are irrelevant, because their case “is about operational
14 negligence and the failure of Defendants to train their agents and employees to proficiency.” *Id.* at
15 5. Defendants say that plaintiffs have put the adequacy of the equipment at issue. *See* Dkt. No.
16 223 at 10. The operative complaint alleges that United and ExpressJet “fail[ed] to use the
17 appropriate devices for providing assistance in the deplaning of [Foster], a disabled passenger.”
18 Dkt. No. 74 ¶ 97(g). Plaintiffs appear to have conceded the relevance issue by not meaningfully
19 pursuing their argument in their reply brief. *See generally* Dkt. No. 224.

20 Plaintiffs also object that Mazzeo’s opinions about the equipment and about the nature of a
21 pilot’s duties contain inadmissible legal conclusions. *See* Dkt. No. 222 at 6-7. Defendants say the
22 opinions are admissible because they embrace “an ultimate issue of fact by collecting objective
23 data and demonstrating how that data relates to the federal standard of care.” Dkt. No. 223 at 9.
24

25 _____
26 ⁴ Plaintiffs say that defendants “waived the choice of law issue because they have litigated this
27 case under California law since this litigation began.” Dkt. No. 212 at 13. Choice-of-law
28 arguments can be waived if not raised in a timely manner. *See In re J.T. Thorpe, Inc.*, 870 F.3d
1121, 1124 (9th Cir. 2017); *Cassirer v. Thyssen-Bornemisza Collection Found.*, 862 F.3d 951, 977
(9th Cir. 2017). But defendants first raised this issue well in advance of trial. *See* Dkt. No. 143 at
7 n.2. The Court declines to find a waiver.

An expert’s opinion “is not objectionable just because it embraces an ultimate issue” in a case. Fed. R. Evid. 704(a); *see CZ Servs., Inc. v. Express Scripts Holding Co.*, No. 3:18-cv-04217-JD, 2020 WL 4518978, at *2 (N.D. Cal. Aug. 5, 2020). But legal opinions are not the proper subject of expert testimony. *See Reed v. Lieurance*, 863 F.3d 1196, 1209 (9th Cir. 2017); *CZ Servs.*, 2020 WL 4518978, at *2. An expert may not give opinions that are legal conclusions, *see United States v. Tamman*, 782 F.3d 543, 552-53 (9th Cir. 2015), or attempt to advise the jury on the law, *see Strong v. Valdez Fine Foods*, 724 F.3d 1042, 1046-47 (9th Cir. 2013). Consequently, Mazzeo may not offer conclusory opinions that the equipment at issue complies with federal regulations. But he may opine on the applicable standards of care in aviation safety and discuss the facts that are relevant to whether defendants complied with those standards.

CONCLUSION

Louisiana law will apply to the apportionment of liability for compensatory damages.
Witness Mazzeo may testify as discussed.

IT IS SO ORDERED.

Dated: April 25, 2023



JAMES DONATO
United States District Judge